SUPREME COURT OF THE UNITED STATES.

No. ~~107.~~ 93.

WILLIAM R. LOVEJOY ET AL., PLAINTIFF IN ERROR,

vs.

EDWARD D. MURRAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 167.

WILLIAM R. LOVEJOY ET AL., PLAINTIFF IN ERROR,

vs.

EDWARD D. MURRAY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print
Writ of error	1	1
Citation	3	1
Bond	4½	2
Plea	5	2
Bond	21	9
Judgment	23	10
Clerk's certificate	24	10

1 *Allowed by P. Sprague, judge of the U. S., Mass. Dist.*

UNITED STATES, *ss:*

The President of the United States to the judges of the circuit court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Edward D. Murray, of Beloit, in the State of Wisconsin, a citizen of said State, merchant, plaintiff, and William R. Lovejoy, William B. Lovejoy, and Albert P. Lovejoy, all of Boston, in the State of Massachusetts, citizens of said State of Massachusetts, merchants and copartners under the name of William R. Lovejoy & Co., defendants, in a plea of trespass on the case a manifest error has intervened to the great damage of the said defendants, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government; that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court at Washington aforesaid, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

[L. S.] H. W. FULLER, *Clerk.*

2 CIRCUIT COURT OF THE UNITED STATES,
Massachusetts District, ss:

And now here, the judges of the circuit court of the United States in and for said district make return of this writ, by answering hereto and sending herewith a true and attested copy of the record and process in the suit within mentioned, and of the proceedings and evidence therein, as within commanded, under the seal of said court.

In testimony whereof, I, Henry W. Fuller, clerk of the said circuit court, have hereunto set my hand and the seal of said court this thirtieth day of Nov., 1863.

H. W. FULLER, *Clerk.*

3 UNITED STATES OF AMERICA,
Circuit Court of the United States, Massachusetts District, ss:

To Edward D. Murray, of Beloit, in the State of Wisconsin, merchant, greeting:

You are hereby cited and admonished to be and appear before the chief justice and associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, the present seat of the government of the United States, then and there to answer to a writ of error this day sued out of the clerk's office of the circuit court of the United States for the first circuit and district of Massachusetts, wherein William R. Lovejoy, William B. Lovejoy, and Albert P. Lovejoy, of Boston, in the State of Massachusetts,

copartners under the name of "William R. Lovejoy & Co.," are plaintiffs in error, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to them in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-fifth day of November, A. D. 1863.

P. SPRAGUE,
Judge of the U. S., Massachusetts District.

4 *Citation.*

BOSTON, *Mass. Dist., Nov.* 25, 1863.

I, Edward D. Murray, the within-named defendant in error, do hereby acknowledge that due service of this citation has been made on me, and I waive all further notice thereof or of the writ within mentioned.

By BROOKS & BALL,
My Attorneys.

4½ *Bond.*

Know all men by these presents that we, William R. Lovejoy and William B. Lovejoy and Albert P. Lovejoy, all of Boston, in the county of Suffolk, as principals, and Samuel Hall and W. P. Pierce, both of said Boston, as sureties, are holden and stand firmly bound and obliged unto Edward D. Murray, of Beloit, in the State of Wisconsin, in the full and just sum of twelve thousand dollars, to be paid unto the said Murray, his executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators firmly by these presents.

Sealed with our seals, dated the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-three.

The condition of this obligation is such, that whereas lately, at a circuit court of the United States, holden at Boston, in and for the district of Massachusetts, on the fifteenth day of October, A. D. 1863, in a suit depending in said court between said Murray and said Wm. R. and Wm. B. and A. P. Lovejoy, judgment was rendered against the said Lovejoys; and the said Lovejoys having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Murray, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, if the said Lovejoys shall prosecute the said writ of error to effect, and answer all costs and damages if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM R. LOVEJOY. [SEAL.]
WILLIAM B. LOVEJOY. [SEAL.]
ALBERT P. LOVEJOY. [SEAL.]
SAMUEL HALL. [SEAL.]
W. P. PIERCE. [SEAL.]

In presence of—
HENRY C. HUTCHINS.

Allowed.

P. SPRAGUE,
Judge United States for District of Massachusetts.

5 United States of America, Massachusetts district, October term, 1857.

At a circuit court of the United States for the first circuit and district of Massachusetts, begun and holden at Boston, within and for the district of Mas-

sachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-three, before the honorable Nathan Clifford, associate justice, and the honorable Peleg Sprague, district judge.

EDWARD D. MURRAY, of Beloit, of the State of Wisconsin, and a citizen of said State of Wisconsin, plaintiff,
vs.
WILLIAM R. LOVEJOY, WILLIAM B. LOVEJOY, ALBERT P. LOVEJOY, all of Boston, in the State of Massachusetts, and citizens of said State, defendants.

In a plea of trespass on the case for that the said William R. Lovejoy, William B. Lovejoy, and Albert P. Lovejoy, heretofore, to wit, on the sixteenth
6 day of May, A. D. 1857, of Dubuque, in the State of Iowa, with force and arms, took and carried away the following goods and chattels of the plaintiff, namely:

22 men's black fur hats.
6 dozen men's Leghorn hats.
24 men's trim'd palm-leaf hats.
24 men's trim'd palm-leaf hats.
12 men's Panama hats.
24 men's Panama hats.
16 men's pedal hats.
22 men's red fur Hung'ry hats.
6 dozen men's white Canton hats.
30 men's black fur Panama hats.
36 men's black wool hats.
12 dozen glazed caps.
30 men's martina fur Panama hats.
60 men's black fur Hung'ry hats.
60 men's red wool Hung'ry hats.
3 dozen boys' China pearl hats.
1 dozen boys' trim'd hats.
11 boys' Dunstable hats.
12 boys' pedal hats.
6 dozen men's palm-leaf hats.
72 boys' check caps.
68 men's check caps.
10 children's pedal hats.

462. 8 black satin vests.
7 677. 6 black satin vests.
1,585. 3 black satin vests.
884. 2 black satin vests.
5,755. 3 black satin vests.
423. 5 black satin vests.
178. 1 black silk vest.
675. 9 watered silk vests.
709. 12 watered silk vests.
761. 6 watered silk vests.
609. 6 watered silk vests.
4,759. 1 watered silk vest.
1,507. 1 black silk vest.
29. 8 fancy silk vests.
659. 4 fancy silk vests.
724. 5 fancy silk vests.

678. 4 fancy satin vests.
772. 3 fancy rib'd vests.
1,561. 3 cass'r vests.
552. 11 jean vests.
1,587. 6 check vests.
4,538. 5 tweed vests.
1,622. 3 tweed vests.
713. 6 cotton vests.
6,149. 9 linen vests.
6,143. 5 linen vests.
769. 6 drill. vests.
4,848. 5 fancy Marsaills vests.
5,756. 6 fancy Marsaills vests.
8 516. 1 fancy Marsaills vest.
545. 4 white Marsaills vests.
6,219. 5 fancy Marsaills vests.
505. 9 fancy check vests.
775. 8 fancy check vests.
6,137. 6 white linen vests.
573. 1 Marsaills vest.
603. 1 Marsaills vest.
547. 2 Marsaills vests.
723. 3 linen drill vests.
1,590. 6 br'd linen drill vests.
557. 6 br'd linen drill vests.
716. 6 fancy cas'r vests.
6,086. 6 pairs fancy cas'r J. C. B. pants.
331. 1 pair cas'r fancy pants.
6,139. 6 pair white linen pants.
5,971. 2 pair white linen pants.
1,546. 15 pair colored linen pants.
587. 6 pair colored linen pants.
693. 14 pair colored linen drill pants.
642. 10 pair colored linen pants.
278. 8 pair colored linen pants.
2. 12 pair colored linen pants.
630. 1 pair colored linen pants.
767. 14 pair linen pants.
671. 36 pair cottonade pants.
333. 60 pair cottonade pants.
764. 1 dozen linen coats.
9 566. 11 pair check pants.
543. 18 pair check pants.
659. 13 pair cottonade pants.
534. 14 pair farmer's drill. pants.
4,721. 25 pair farmer's drill. pants.
209. 24 pair cottonade pants.
290. 13 pair cottonade pants.
30 pair red flannel drawers.
1,601. 24 red flannel shirts.
6 fancy red flannel shirts.
1,613. 9 fancy flannel shirts.
6 blue flannel shirts.
2,399. 4 red flannel shirts.
3 Guernsey shirts.
1,607. 12 br'd linen coats.

589. 5 white linen coats.
6,126. 6 fancy linen coats.
146. 5 fancy linen coats.
502. 16 check linen coats.
340. 6 check linen coats, J. C. B.
5,391. 23 white drill coats.
582. 11 mars. coats.
608. 9 br'd drill. coats.
256. 10 ch. coats.
1,541. 12 ch. coats.
646. 16 ch. coats.
502. 6 ch. linen coats.
146. 6 ch. linen coats.
154. 3 fancy cas'r coats.
10 551. 3 fancy cas'r coats.
6,141. 3 farmer's sabre coats.
231. 13 pair bl'k pants.
349. 12 pair bl'k pants.
805. 4 French cas'r coats.
26 pair dogskin gloves.
19 Beaufort ties.
767. 4 Beaufort ties.
503. 12 fancy opera ties.
12 fancy opera ties.
30. 42 Alma ties.
108. 21 Alma ties.
157. 17 Alma ties.
707. 12 black ties.
9. 18 fancy ties.
12 pair cotton ½ hose.
12 pair cotton ½ hose.
5 pair silk hose.
12 pair silk hose.
Case 1. 5 pair men's calf boots, (J. C. B.)
Case 2. 11 pair men's calf boots.
28. 9 pair men's calf boots.
45. 7 pair men's calf boots, S. L.
43. 12 pair men's patent leather boots.
44. 12 pair opera boots.
66. 33 women's rubber buskins.
65. 32 women's heavy over.
'11 69. 18 men's sandals, over.
24 misses' sandals, over.
32 misses' Gossamer, over.
32 women's sandals, over.
35 enamel'd satchels.
44 enamel'd satchels.
4 enamel'd cottage satchels.
3 leather satchels.
5 carpet bags.
1 carpet bag.
423. 1 drab overcoat.
527. 2 drab overcoats.
573. 1 black overcoat.
429. 1 black overcoat.
281. 4 black cloth coats.

	1,514.	1 black cloth coat.
	1,563.	1 leopard overcoat.
	573.	1 black overcoat.
	282.	3 black overcoats.
	402.	2 brown overcoats.
		1 Nigea head coat.
	321.	1 brown cloth coat.
	953.	1 black cloth coat.
	282.	1 black cloth coat.
	336.	1 rib'd beaver coat.
	168.	5 cloth coats.
	64.	2 cloth coats.
	300.	1 cloth coat, J. C. B.
12	529.	1 blue cloth coat.
	1,617.	1 black cloth coat.
	280.	2 lionskin cloth coats.
	291.	1 blue mohair coat.
	148.	1 black beaver coat.
	252.	1 black beaver coat
	1,619.	1 black cloth coat.
	294.	1 black mohair coat.
		52 common umbrellas.
	2.	36 men's black fur hats.
	8.	12 men's black fur hats.
	7.	12 men's brown fur hats.
	32.	12 men's brown fur hats.
	31.	24 men's brown fur hats.
	30.	12 men's soft fur hats.
	24.	12 men's pearl fur hats.
	29.	12 men's brown fur hats.
	23.	12 men's claret fur hats.
	27.	12 men's brown wool fur hats.
	25.	12 men's neutria fur hats.
	28.	12 men's pearl fur hats.
	13.	12 boys' lasting caps.
	15.	12 boys' drab satin caps.
	2.	12 boys' drab cloth caps.
	6.	12 boys' black velvet caps.
	14.	12 boys' brown satin caps.
	1.	12 boys' silk caps.
	72.	24 fancy ties.
13	495.	36 black silk ties.
	421.	28 black silk ties.
	466.	12 Albert ties.
		24 Albert ties.
		5 ties.
		6 ties, J. C. B.
	130.	9 Beaufort ties.
	40.	10 fancy ties.
	1,629.	43 Napoleon ties.
	177.	12 pair suspenders.
	201.	12 pair suspenders.
	312.	24 pair suspenders.
	311.	24 pair suspenders.
	20.	18 pair suspenders.
	22.	24 pair suspenders.

	6.	24 pair suspenders.
	10.	24 pair suspenders.
	11.	24 pair suspenders.
	99.	24 pair suspenders
	48.	24 pair suspenders.
	250.	12 pair suspenders.
	365.	10 self-adjusting stocks.
	549.	9 self-adjusting stocks.
	46.	9 Napoleon ties.
		2 mufflers.
		5 fancy stocks.
	126.	11 pair chamois lined gloves.
	131.	23 brown linen gloves.
14	9.	12 lisle gloves.
	27.	12 fancy scarfs.
	5, 984.	11 fancy scarfs.
	50.	22 fancy scarfs.
		5 neutria fur caps.
		1 set fitch furs.
		1 set fitch furs.
		1 set squirrel furs.
		1 hair-seal coat, J. C. B.
		1 hair-seal coat.
		2 coon coats.
		3 velvet portmonies.
		3 emb. portmonies.
		8 emb. portmonies.
		8 emb. portmonies.
		6 black portmonies.
		5 calf wallets.
		6 cloth brushes.
		6 cloth brushes.
		5 flesh brushes.
		6 barbers' hair brushes.
		9 hair brushes.
		6 hair brushes.
		9 hair brushes.
		7 hat brushes.
	11.	6 dozen fine combs.
		6 dozen fine combs.
15		42 nail brushes.
		7 pair ladies' riding gloves.
		6 tortoise s. combs.
		1 pearl portmonie.
		1 pearl portmonie.
		1 pearl portmonie.
		8 tortoise s. pocket combs.
		12 watch guards.
		12 pair cotton half hose.
		12 pair cotton half hose.
		12 pair cotton half hose.
	9.	12 boys' farmer satin.
	1, 662.	2 German cas'r coats.
	6, 182.	1 fine black cloth coat.
	243.	2 fine black cloth coats, J. C. B.
	1, 588.	2 fine black cloth coats

550. 5 white duck.
36 pair Jones wool socks.
36 pair Jones wool socks.
36 pair Jones wool socks.
4 bankers' cases.
72 bottles balm thousand flowers.
4 dozen rose oil.
48 bottles hair oil.
1. 72 string collars.
1. 12 string collars.
2. 144 Byron collars.
16 3. 119 string collars.
4. 20 string collars.
4. 60 string collars.
5. 88 Byron collars.
6. 34 Marseilles collars.
6. 32 fancy Byron collars.
26 fancy Marseilles.
112. 12 pair cashm'r pants.
113. 12 pair cashm'r pants.
1. 4 pearl card cases.
2. 3 pearl card cases.
3. 4 pearl card cases.
48 tooth brushes.
60 tooth brushes.
19. 108 pair Jones wool socks.
20. 72 pair Jones wool socks.
72 pair Jones white tops.
60 fancy ch. shirts.
1, 622. 22 fancy ch. shirts, J. C. B.
L. 60 white shirts.
X. 48 white shirts.
Paris 4. 36 white shirts.
48 fancy w. shirts.

less 1 pair of fine boots. All said goods and chattels then and there found, and being of great value, to wit, of the value of six thousand and one hun-
17 dred and twenty-eight dollars and three cents, and converted the same to their own use. The writ in this case bears date the first day of October, A. D. 1860, and was duly entered at the October term of this court, in the year eighteen hundred and sixty: when and where the plaintiff appeared by Messrs. Brooks and Ball, his attorneys, and the defendant by Messrs. Hutchins and Wheeler, his attorneys. The case was thence continued from term to term to the May term, A. D. 1863; when the following agreed statement of facts was filed in the case, to wit:

United States circuit court district of Massachusetts, May term, 1863.

EDWARD D. MURRAY
vs.
WM. R. LOVEJOY *et als.*

Agreed statement of facts.

This is an action of trespass.

The writ bears date on the first day of October, A. D. 1860, and the writ and declaration are made a part of the case:

The plaintiff is a citizen of Beloit, in the State of Wisconsin, and the defend-

ants are citizens of Boston, Massachusetts. The defendants in this suit, William R. Lovejoy & Co., on the sixteenth day of May, A. D. 1857, in a suit wherein they were plaintiffs, and one O. H. Pratt was defendant, in the district court for
18 Dubuque county, Iowa, made an attachment in Dubuque, of certain personal property, as the property of said Pratt, for which the plaintiff in this suit now sues. M. M. Hayden was the sheriff who made the attachment; Chaplin and Dillon were the attorneys of said Wm. R. Lovejoy & Co., in that suit, and gave a bond, a copy of which is hereto annexed, and which the defendants ratified. The said William R. Lovejoy & Co. recovered judgment against said Pratt in said suit, and the property attached was sold by said Hayden, upon said William R. Lovejoy & Co.'s process, by the direction of their attorneys.

The plaintiff in this suit claiming said property on the thirtieth day of May, A. D. 1857, sued said Hayden in the district court for said county of Dubuque, for the same trespass in so attaching said property that he now sues these defendants for, and recovered, on a verdict of the jury, judgment against said Hayden in that action on the twentieth day of October, A. D. 1859, for six thousand two hundred and thirty-three dollars and three cents damages, and costs of suit taxed at seventy-seven dollars and fifty-five cents, which
19 judgment has never been reversed, and is still in full force; and the said Hayden satisfied said judgment in part, to wit, for the sum of eight hundred and thirty dollars, ($830 00,) out of the proceeds of the attached property, before the bringing of this suit against the defendants. Either party may refer to a certified copy of said judgment against the said Hayden, as a part of this case.

The said Hayden notified said William R. Lovejoy & Co.'s said attorneys, Chaplin and Dillon, to defend said suit so brought against said Hayden, and said William R. Lovejoy & Co. employed and paid Chaplin and Dillon to defend the same, and they did defend it and had the exclusive control of the defence of said suit, being assisted therein by Benjamin M. Samuels, esq'r, who was employed by William R. Lovejoy & Co., by their said attorneys, Chaplin and Dillon, and who was paid by William R. Lovejoy & Co., and said Hayden paid him also $100 out of the proceeds of the attached property.

On the twenty-eighth day of April, A. D. 1860, said William R. Lovejoy & Co. paid to said Hayden $1,000, and said Hayden delivered up said
20 bond to them, and it is now in their possession, the plaintiff not admitting that said bond was rightly delivered up; either party may refer to the printed laws of Iowa.

If the court are of the opinion that the plaintiff cannot maintain this action against the defendants, by reason of having recovered judgment against the sheriff, Hayden, and by reason of having received part satisfaction of him, judgment is to be entered for the defendants; otherwise the case is to stand for trial before the jury, unless the court shall be of opinion that the defendants are estopped upon the foregoing facts, by the judgment in the said suit against the said Hayden, from making further defence in this action, in which case the court are to enter such judgment as shall be proper.

Either party prosecute a writ of error to the Supreme Court of the United States.

BROOKS & BALL,
Plaintiff's Attorneys.
HUTCHINS & WHEELER,
Defendants' Attorneys.

21 *Bond.*

Know all men by these presents that we, the undersigned, Wm. R. Lovejoy & Co., of New York, C. J. Cummins and B. W. Balch, of the city and county

of Dubuque, Iowa, are held and firmly bound unto M. M. Hayden, sheriff of the county of Dubuque, State of Iowa, in the penal sum of nine thousand dollars, well and truly to be paid. Dated this sixteenth of May, A. D. 1857.

The condition of this obligation is such, that whereas the said Hayden, as sheriff of Dubuque county, aforesaid, has attached and taken possession of certain dry goods and merchandise, more particularly described in an inventory hereto annexed and marked Exhibit A, at the request of Wm. R. Lovejoy & Co., under and by virtue of a writ of attachment issued out of the office of the clerk of the district court of Dubuque county aforesaid, in the cause of the said Wm. Lovejoy & Co. *vs.* O. H. Pratt, now pending in said court, now, therefore, if the above-bound Wm. R. Lovejoy & Co. shall and will pay all damages which the said Hayden may sustain, or which may be recovered against him by reason of his attaching said property as aforesaid, and shall in all respects save the said Hayden harmless in the premises, then this obligation to
22 be void; otherwise, in full force and effect in law.

WM. R. LOVEJOY & CO.,
By CHAPLIN & DILLON,
Their Attorneys.
C. J. CUMMINGS.
B. W. BALCH.

23 This cause came on to be heard at the last term of this court upon the pleadings and statements aforesaid, and was argued by counsel, and was thence continued to this present term. And now, after mature deliberation thereon had, the court are of opinion, upon the agreed facts in this case, that the defendants are estopped by the judgment in the said suit against said Hayden from making further defence in this action, and that the plaintiff is entitled to recover therein. It is thereupon considered and ordered by the court that said Edward D. Murray recover against said William R. Lovejoy, William B. Lovejoy, and Albert P. Lovejoy, the defendants, the sum of six thousand nine hundred and four dollars forty-three cents damages, with costs of suit taxed at two hundred and eighty-five dollars and forty-six cents.

A true record. Attest: H. W. FULLER, *Clerk.*

24 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, Henry W. Fuller, clerk of the circuit court of the United States for the first circuit Massachusetts district, do hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of Edward D. Murray *vs.* William R. Lovejoy *et als.* in this court determined.

In testimony whereof, I have hereunto subscribed my name and affixed the [SEAL.] seal of said court, at Boston, in said district, this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

H. W. FULLER, *Clerk.*

Filed December 5, 1863.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1865.

WM. R. LOVEJOY & ALII, PLFFS. IN ERROR *vs.* EDW'D D. MURRAY, DEFT. IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

This is an action of trespass brought by Murray against William R. Lovejoy & Co. The cause came before the court below upon an agreed statement of facts. It appears by this agreed statement, that William R. Lovejoy & Co. caused to be attached on their suit against one O. H. Pratt, in Iowa, the property of said Murray. That Murray sued Hayden, the attaching officer, and obtained a judgment against him which Hayden satisfied in part only, viz.: for eight hundred and thirty dollars, the judgment being October 20, 1859, for

$6,233	03 damages,
77	55 costs.
$6,310	58

Vide printed record, p. 8 and 9.

The present suit was brought by said Murray against said Wm. R. Lovejoy & Co. for the same trespass.

For a full and able exposition of the case and the principles upon which Mr. Justice Clifford based his decision, reference is hereby made to his very elaborate and able opinion, a copy of which is appended.

It is respectfully submitted, on behalf of said Murray,

1. That Wm. R. Lovejoy & Co. are liable in this case, because,

a. They caused the attachment to be made.

b. They gave the attaching officer a bond of indemnity. Their attorneys executed the bond in the name of them, the said Wm. R. Lovejoy & Co., and they ratified it.

c. The property attached was sold by the attaching officer by direction of Wm. R. Lovejoy & Co.'s attorneys.

d. Wm. R. Lovejoy & Co. employed and paid counsel to defend the suit brought by Murray against Hayden, and had the exclusive control of the defence of that suit.

Vide printed record, p. 8 and 9.

e. "All persons who direct or request another to commit a trespass are liable as co-trespassers," and giving a bond of indemnity in such case, makes the party a trespasser.

Herring *vs.* Hoppock, 15 New York, 409, 413.
Davis *vs.* Newkirk, 5 Denio, 92, 94.
Root *vs.* Chandler, 10 Wendell, 110–112.
Wall *vs* Wall, 12 Wendell, 39.

This proposition is well established elementary law, and need not be further elaborated.

2. The next question which arises on this record is whether Murray is precluded from maintaining this action by reason of having obtained judgment against the attaching officer and the receipt of part satisfaction. No execution was ever taken out against the attaching officer, and the eight hundred and thirty dollars, the amount paid by him on the judgment, was paid out of the proceeds of the attached property before this present action was brought.

Vide printed record, p. 9.

And on this branch of the case it is submitted that he is not so precluded.

a. It is a well settled elementary principle of law that all torts are several as well as joint and that the injured party can maintain an action against all the tort feasors jointly or against each one separately.

Baker *vs.* Lovett, 6 Mass., 80.
Smith *vs.* Rines, 2 Sumner, 347.
Mitchell *vs.* Tarbutt, 5 Term, 651.
Cocke *vs.* Jennor, Hobart's Reports, 66.

b. If this be true all the legal consequences must necessarily follow and the injured party must have the right to pursue each tort feasor to judgment and execution. He can have only one satisfaction but he can have judgment and execution against each one till he obtains satisfaction.

Cocke *vs.* Jennor, Hobart's Reports, 66, cited *ante.*

c. A judgment against one tort feasor is no bar to a suit against his co-trespasser. Nothing short of full and actual satisfaction will be a bar.

Sanderson *vs.* Caldwell, 2 Aiken (Vt.), 195, 201.
Morgan *vs.* Chester, 4 Connecticut, 387.
Sheldon *vs.* Kibbe, 3 Conn., 214.
Hyde *vs.* Noble, 13 New Hampshire, 501.
Hepburne *vs.* Sewell, 5 Harris & Johnson, 211, 212.
Sharp *vs.* Gray, 5 B. Monroe, 4.
Barb *vs.* Fisk, Sup. Ct. Indiana, 5 Western Law Journal, 279.

Livingston *vs.* Bishop, 1 John. 290.
Curtis *vs.* Grout, 6 Johnson, 168.
Osterhout *vs.* Roberts, 8 Cowen, 43.
Calkins *vs.* Allerton, 3 Barbour, 173.
Jones *vs.* McNeil, 2 Bailey, 474.
Knott *vs.* Cunningham, 2 Sneed, 204.
Elliott *vs.* Porter, 5 Dana, 299.
Blann *vs.* Crocheron, 20 Alabama, 320.
Williams *vs.* Otey, 8 Humphreys, 563, 568, 569.
1 Greenleaf on Ev., Sec. 533.
2 Kent's Commentaries, 10 Ed., 388, 389.
Cocke *vs.* Jennor, Hobart Rep., 66, cited *ante.*
Corbet *vs.* Barnes, Wm. Jones' Report, 377.
Cooper *vs.* Shepard, 3 Manning G. & Scott, 266.

In this last case the former judgment had been paid, although that fact is by mistake omitted in the marginal note. The Court in this last case say, "Plaintiff after he has once received the full value is not entitled to further compensation in respect to the same loss, and according to the doctrine of cases cited in the argument, by a former recovery in trover *and payment of the damages*, the plaintiff's right of property is barred, and the property vested in the defendant in that action. See Adams *vs.* Broughton, 2 Strange, 1078, and Jenkins 4, Cent. Ca., 88, p. 189, where it is laid down in trespass against B. for taking a horse, A recovers damages by this recovery and *execution done thereon*, the property in the horse is vested in B., *Solutio pretii emptionis loco hebetur.*"

Thus it will be seen that it is *the payment of the judgment* i. e. "*execution done thereon*" that transfers the property. It is not by the recovery of the judgment nor by the issuing of a writ of execution that the title to the property is changed, but only by the payment of the judgment *Solutio pretii emptionis loco habetur.*

d. All that the present case finds on this point is, that a judgment was recovered by the plaintiff against the attaching officer. *No execution issued* but the attaching officer paid $830 on the judgment and that the money so paid was paid out of the proceeds of the attached property.

Vide printed record, p. 8 & 9.

If the money had been paid by Hayden, the attaching officer, out of his own individual funds, it is respectfully submitted that it would not prevent a recovery in this suit, as *nothing short of full satisfaction for the whole amount would be a bar,* but in no aspect of the case can merely receiving this money from the attaching officer be construed to be an election on the part of Murray to take him as alone responsible for the tort, and an election to discharge Wm. R. Lovejoy & Co. The payment in fact is really to be construed as a payment by Wm. R. Lovejoy & Co., rather than by the attaching officer as it was out of the proceeds of the attached property, which proceeds, as between the attaching officer and Wm. R. Lovejoy & Co., Wm. R. Lovejoy & Co. had the control of, they having given Hayden a bond of indemnity. Besides Murray was bound to take the money when offered by Hayden. Part payment by Hayden before suit against him would have been no bar even in the suit against him and there is no reason for holding that part payment after judgment against him could have any other or greater effect either in favor of him or any co-trespasser.

e. As all torts are several as well as joint, it necessarily follows that the injured party has his several remedy against each wrong-doer, and if he has his several remedy against each, he must of necessity have the right to pursue that remedy to judgment and execution and obtain one satisfaction. If he has not this right, torts are not several as well as joint, and the whole elementary doctrine on this subject is overthrown; since if a judgment against one without satisfaction is a bar to several suits against the others, then it is absurd and a contradiction in terms to say that the injured party has his several remedy against each wrong-doer, but the moment he recovers judgment against one wrong-doer, even without satisfaction, he is thereby defeated in all his other suits. If the remedy is several and joint both, it irresistibly follows that the several remedy against each may be pursued to judgment and execution, but only one satisfaction can be obtained except for costs. In no other way can the elementary doctrine of law either be sustained or enforced. If the elementary doctrine is right, these conclusions follow inevitably, and if on the other hand, Murray is barred from maintaining this action against Wm R. Lovejoy & Co., then the doctrine that torts are several as well as joint must be abandoned and a new rule be adopted as a rule of law that torts are only joint, thus reversing the whole current of authorities as well as the reason and justice of the rule.

f. If it be argued that the judgment against one tort feasor passes the title in the property to that tort feasor, it is respectfully submitted that this doctrine is only true in case

the judgment is satisfied, — that it is true *only in case execution has been done thereon,* to use the significant language of the old cases and *then the maxim, solutio pretii emptionis loco habetur,* has its proper application.

See cases cited *ante.*

g. The principle of *transit in rem judicatam* referred to in some of the cases on this subject cannot be held to extend any further than that the remedy against the tort feasor sued becoming merged in the higher security, i. e., the judgment, the party injured as against that particular tort feasor cannot sue on the original cause of action again, but must on the judgment: — but he still has all of his original rights against all the co-trespassers, and this view is clearly sustained by the opinion of Lord Ellenborough in Drake *vs,* Mitchell, 3 East. 258, in which he says "*I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have.*"

Drake *vs.* Mitchell, 3 East. 258.
Sheehy *vs.* Mandeville, 6 Cranch. 253.

h. But even if the doctrine were true that the title to the property passes to the trespasser sued by judgment against him without satisfaction (which doctrine is denied), yet it by no means follows that several actions cannot still be maintained against each co-trespasser. The gravamen of the action is the damage done to the property at the time or the conversion at the time of the trespass, and it certainly can be no answer to the action against one trespasser that a judgment prior in time has been recovered against a co-trespasser for the same tort, even if the title to the property passed by such judgment (which is denied), because the right to maintain the subsequent action depends upon the state of the title at the time of the trespass, and not the state of the title at the time of the trial.

Boynton *vs.* Willard, 10 Pick. 166.

i. If a trespass is done to property to-day and a week or month hence the title passes to another party, either by sale or judgment, the original owner is not barred by such change of title from maintaining his action. His right to maintain the action depends upon the title at time of the trespass, and not upon the title afterwards.

j. But as we have before seen, the doctrine of *transit in rem judicatam* cannot be extended farther than that a judgment against one co-trespasser merges in relation *to him, and him only,* the original cause of action into a higher security viz. the judgment, and that no suit upon the original cause of action can be again maintained *against him,* but that the remedy *against him*

must be upon the judgment, but as against the co-trespassers, the original remedies of the injured party remain unaffected.

k. In civil actions where several parties are jointly and severally liable on the same contract, judgment against one without full satisfaction is no bar to a suit against the others. The plaintiff can proceed against all jointly, or each separately, and in the latter case take a separate judgment and execution against each, but he can have only one satisfaction, and costs on all the executions.

Sanderson *vs.* Caldwell, 2 Aiken, Vt., 201.
Simonds *vs.* Center, 6 Mass., 18.
Ward *vs.* Johnson, 13 Mass., 150.

l. Is the rule different in case of *torts* ? *It is not.*

Livingston *vs.* Bishop, 1 Johnson, 290.
Knott *vs.* Cunningham, 2 Sneed, 204, 210.
Blann *vs.* Crocheron, 20 Ala. 320, 321.

All torts are several as well as joint. If Wm. R. Lovejoy & Co. and the attaching officer had purchased the property, and jointly and severally agreed to pay for it, it will be conceded by the other side that Murray could have proceeded to judgment and execution in several suits against them, until he obtained full satisfaction. Why should he not then have the same right where they have *against his will and wrongfully* taken his property, in which case the law pronounces the *tort several as well as joint,* and *the remedy several as well as joint ?* Why should a party, whose property has been forcibly taken from him by several persons, be compelled to elect which one he will pursue to judgment, and if he happens to get a judgment against the one who is worthless and insolvent, all his rights and remedies against the others be barred ? *Does the law make this discrimination in favor of wrong-doers, which it does not recognize anywhere in the case of joint and several contracts ?* No such distinction exists, or can be supported either upon principle or authority.

Sanderson *vs.* Caldwell, 2 Aiken, 201, cited *ante.*

m. It is therefore respectfully submitted that the recovery of judgment against Hayden, and part satisfaction, is no bar or answer to this present suit.

The doctrine in Broome *vs.* Wooton, Yelverton 67 j. is not supported by the reasoning i the case. The only ground of the decision in that case is that the damages which were uncertain before are made certain by the judgment. The language of that case is " for *transit in rem judicatam,* and the thing uncertain is now by the judgment made certain, and so altered and changed into another nature than it was at first, and therefore he cannot resort to demand the uncertainty again, for the first judgment shall be a bar to it."

The same reasoning would apply to all joint and several contracts with as much force as to trespasses; for until judgment the amount is uncertain, and only made certain by the judgment; and yet no one will contend that a judgment and execution against one of several joint and several contractors, where the amount is uncertain and only made certain by the judgment, is a bar to a suit against the co-contractors. If such doctrine be true, a judgment and execution against one of the parties severally liable on a note, bond, or bill of exchange releases all the other parties. (See the author's note in Yelverton.) It may be proper to remark, in the present case, that no execution was taken out against the attaching officer, while in Broome *vs.* Wooton execution had issued.

The decision of a majority of the Court in Campbell *vs.* Phelps, 1 Pick. 62, does not decide the question whether judgment and execution against one trespasser is a bar to a suit against a co-trespasser. The Court expressly say on p. 66, "This question may be considered as not entirely settled, and as there is another point upon which this case may be determined, we do not give any decisive opinion upon it." And the ground upon which the majority of the Court decided that case was as stated by the Court, to use its own language, p. 66. "The point upon which a majority of the Court are agreed is that, the sheriff and his deputy are not to be considered as joint trespassers in any tort done by the latter alone, so as to subject them either to a joint action, or to give the party injured a right to bring his action against one after having recovered judgment and sued out execution against the other." In that case, not only had execution been taken out, but upon it the deputy had been committed to jail.

Vide also the dissenting opinion of Judge Wilde in same case, p. 68, which it is respectfully submitted contains the sounder reasoning.

The reasoning of the court in White *vs.* Philbrick, 5 Maine, 147, is entirely against the decision made by the court in that very case, and in support of the doctrine which the defendant in error in this case claims to be the better doctrine.

Although it is not necessary to consider how this cause would stand if execution had been issued against the attaching officer, as that fact does not exist in the present case, yet as that subject is somewhat discussed in detail in some of the authorities it may be proper to advert to it here.

The execution is but the mere incident of the judgment. It is only a means of enforcing a judgment and it necessarily follows that if the right to several judgments exists, the right to enforce them by execution till one satisfaction is obtained also exists. The law cannot be said to be guilty of the absurdity of giving the injured party a several remedy against each wrongdoer, but the moment he attempts to enforce his remedy by judgment and execution against one, depriving him for that reason of all remedy against the others.

3. This brings us to the consideration of the remaining question in this case, and that is, whether the verdict and judgment in the suit against the attaching officer, upon the facts

agreed, are conclusive upon Wm. R. Lovejoy & Co., so that they are estopped to contest the case again on its original merits? It is respectfully submitted that said judgment is conclusive upon them, and that they are so estopped, and that upon the statement of facts judgment was properly rendered against them for the amount of the judgment in the suit against the attaching officer, with interest, less the $830 paid by the attaching officer out of the proceeds of the attached property.

Vide printed record, pp. 8–9.

a. The attaching officer was their agent. They directed the attachment and sale — they ratified the bond of indemnity given in their names by their attorneys to the attaching officer. He notified them to defend the suit against him — they did defend that suit — they were the real defendants in that suit — the attaching officer was merely a nominal defendant — they were the real parties in interest — they paid the attorneys for defending and they had the exclusive control of the defence of that suit. There was a closely contested trial on the merits, and a verdict and judgment for Murray.

b. The present suit is the same form of action.

c. Privies, as well as parties, are concluded by a judgment. Wm. R. Lovejoy & Co. not only defended the attaching officer, but were bound to defend him. They expressly covenanted against the result of that suit.

d. The judgment against the attaching officer is therefore conclusive against Wm. R. Lovejoy & Co., and they cannot again contest the case on its original merits.

Rapelye *vs.* Prince, 4 Hill, 119, 123.
Chicago City *vs.* Robbins, 2 Black, 418.
1 Greenleaf on Evidence, Sec. 523.
Smith *vs.* Kernochen, 7 Howard, 209, 216, 217, 218, 219.
Calkins *vs.* Allerton, 3 Barbour, 173.
Glass *vs.* Nichols, 35 Maine (5 Red.), 328.
Warfield *vs.* Davis, 14 B. Monroe, 41, 42.
Tarlton *vs.* Johnson, 25 Alabama, 300, 314.
Castle *vs.* Noyes, 14 New York (4 Kernan), 329.
Doty *vs.* Brown, 4 Comstock, 71.
Eaton *vs.* Cooper, 29 Vermont (3 Williams), 444.
Peterson *vs.* Lathrop, 34 Penn. (10 Casey), 228, 229.
Hancock *vs.* Welch, 1 Starkie, 347.
Farnsworth *vs.* Arnold, 3 Sneed, 252.
Griffin *vs.* Reynolds, 17 Howard, 609.

Carpenter *vs.* Pier, 30 Vermont, 88.
State of Ohio, *vs.* Colerich, 3 Ohio, 487.
Emery *vs.* Fowler, 39 Maine, 326.
Kent *vs.* Hudson River R. R. Co., 22 Barbour, 278.
Bates *vs.* Stanton, 1 Duer, 79.
Green *vs.* Clark, 2 Kernan, 343, 350, 351, 353, 358.
Train *vs.* Gold, 5 Pick. 382, 387.
Calhoun's lessee *vs.* Dunning, 4 Dallas, 120.
Atkinson *vs.* Purdy, Crabbe, 555.
Sevey *vs.* Chick, 1 Shepley, 141.
Ex'ors Tate *vs.* Hunter, 3 Strobhart Eq. 139, 146.
Lanfear *vs.* Sumner, 17 Mass. 112.
Coates *vs.* Roberts, 4 Rawle, 111, 112.
Marsh *vs.* Pier, 4 Rawle, 273, 284, 285.
King *vs.* Chase, 15 New Hamp. 19.
Rogers *vs.* Haines, 3 Greenleaf, 362, 366.
Charlotte Hall School, *vs.* Greenwell, 4 Gill. & John. 414, 415.
Dame *vs.* Wingate, 12 New Hamp. 293.
Littleton *vs.* Richardson, 34 New Hamp. (3 Fogg) 179.
Kip *vs.* Brigham, 6 Johnson, 158.
Carman *vs.* Noble, 9 Barr. 373.
Head *vs.* Lodge, 20 Pick. 53.
Weld *vs.* Nichols, 17 Pick. 544.
Valentine *vs.* Farnsworth, 21 Pick. 176, 181, 182.
Stevens *vs.* Hughes, 31 Penn. 381.
Also cases cited on this point in the Opinion of Mr. Justice Clifford.

Joshua D. Hall
Atty for defendants

Opinion by Mr. Justice CLIFFORD:—

This is an action of trespass, and the case comes before the court upon an agreed statement of facts. Referring to the agreed statement, it will be seen that the present defendants, on the sixteenth day of May, 1857, in a certain suit, wherein they were plaintiffs, and one O. H. Pratt was defendant, attached certain personal property as the property of the defendant in that suit. According to the agreed statement, the suit was commenced in the District Court for the County of Dubuque, in the State of Iowa, and the writ of attachment was served, and the attachment made by the sheriff of that county; but the case shows, that in serving the writ, and in making the attachment, he acted by the directions of the attorneys of the plaintiffs in the suit, and that they, the attorneys gave him a bond of indemnity, conditioned that the plaintiffs should pay all damages he might sustain by reason of his making the attachment, and stipulating to save him harmless in the premises, and that the plaintiffs ratified their doings in giving the bond. Agreed statement also shows, that the plaintiffs in that suit recovered judgment, and that the property, so attached, was sold under the process of the plaintiffs, and by the directions of their attorneys. Property so attached and sold, was claimed by the plaintiff in this suit, and he, on the thirtieth day of May, 1857, brought an action of trespass against the sheriff, who had thus attached and sold the property. Due notice was given by the sheriff to the attorneys who brought the attachment suit and gave the directions and executed the bond of indemnity, to appear, and defend the trespass suit, and the present defendants employed counsel and defended the suit. Trial was had, and on the twentieth day of October, 1859, judgment was rendered against the sheriff for the sum of six thousand two hundred and thirty-three dollars and three cents damages, and costs of suit, taxed at seventy-seven dollars and fifty-five cents. No execution ever issued upon the judgment, but the case shows that the sheriff satisfied the judgment against him, in part, to wit, for the sum of eight hundred and thirty dollars, out of the proceeds of the attached property. Present defendants employed the counsel to defend that suit, and had the exclusive control of the defence; and the case shows that they had paid all of the counsel fees, except one hundred dollars, which was paid by the sheriff out of the proceeds of the attached property, and it should be remarked, that both of the payments made by the sheriff out of the proceeds of the attached property, were made prior to the commencement of this suit. Mention should also be made of the fact, that, on the twentieth day of April, 1860, the present defendants paid the sheriff one thousand dollars, and that he, on the same day, surrendered the bond of indemnity to their attorneys; but it should be remarked, in the same connection, that the admission to that effect is accompanied by a denial on the part of the plaintiff in this suit, that the surrender so made was rightful, and also that the bond is now in the possession of the attorneys to whom it was delivered. Writ is dated the first day of October, 1860; and the agreement is, that if the court should be of opinion that the suit cannot be maintained against the defendants, by reason of the former

judgment against the sheriff, and by reason of having received part satisfaction of him, then judgment is to be entered for the defendants; otherwise the case is to stand for trial, unless the court shall be of opinion that the defendants, upon the foregoing facts, are estopped from making further defence in this action, in which event the court is to enter such judgment as shall be proper. Practical questions, like those presented in this record, ought not now to be the subject of dispute or doubt, but it must be admitted, that in respect to most or all of them, it would not be difficult to present authorities of an entirely contradictory character. Certain general principles, however, which are applicable to the case may be regarded as settled; and among the number is the rule, that the attachment and sale of the property of a third person, under the circumstances disclosed in the agreed statement, is tortious, as against the person whose property is so taken and converted, and renders the sheriff liable to the plaintiff therefor, as a wrong-doer.

Doubt cannot be entertained upon the subject, and it is equally clear, that the present defendants rendered themselves also liable to the plaintiff as wrong-doers, by subsequently ratifying the directions given by their attorneys, and by approving what they had done, in giving the bond of indemnity. Indemnification itself must be regarded as a ratification of the attachment and as the cause of the subsequent sale; and the well settled rule is, that all persons who direct, or request another to commit a trespass, are liable as co-trespassers, if their directions or request are obeyed and followed. Herring *vs.* Hoppock, 15 N. Y. 409; Castle *vs.* Bullard, 23 How. 185. Where the attachment is made by the directions of the plaintiff, he is as much liable as the sheriff making it; and after conversion, the injured party may sue both or each one separately, as in other cases of joint and several liability. More than half a century ago, *Parsons C. J.* held, in Baker *vs.* Lovett, 6 Mass., 80, that where a trespass had been committed by several persons jointly, the party injured might sue any or all the trespassers, but he could have but one satisfaction for the same injury. Nothing is more clear, said Judge Story, in Smith *vs.* Rines et al., 2 Sum. C. C., 348, than the right of the plaintiff to bring an action of trespass or trespass on the case, against all the wrong-doers, or against any one or more of them, at his election. Undoubtedly, the injured party may proceed against all the wrong-doers, jointly, or he may sue them all or any one of them separately; but if he sues them all jointly, and has judgment, he cannot afterwards sue any one of them separately; or if he sues one separately, and has judgment, he cannot afterwards sue them all in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy; but it is no bar to a suit for the same trespass against any one or more of the other co-trespassers. Cases may be found, and have been cited at the bar, which assert a different rule, and which decide, that, where separate actions are commenced against several tort feasors for the same act of trespass, the pendency of the first suit may be pleaded in abatement of all the rest; but the doctrine, as was well said by Prentiss J. in

Sanderson *vs.* Caldwell, 2 Aiken., 201, is opposed to the principle which runs through all the authorities, that a separate trespass attaches to each of the parties individually, and which asserts that the plaintiff may sue all or any of them, or bring separate suits against each, at his election. *Heydon's Case*, 11 Co. 5; *Mitchell* v. *Tarbutt*, 5 Term. 649 ; *Thomas* v. *Rumsey*. 6 John. 30; *Livingston* v. *Bishop et al.*, 1 John, 290; Brooke, Abt. Judgment, Pl. 98; *Cocke* v. *Jennor*, Hobart's Rep. 66; *Corbet* v. *Barnes*, W. Jones, 377; *Bird* v. *Randall*, 3 Burr. 1345, Much discussion, says Mr. Greenleaf, has taken place as to the effect of a former recovery, in cases where different actions of tort have successively been brought in regard to the same chattel; as, for example, where an action of trover is brought after a judgment in trespass. Great diversity of opinion, he says, has existed, whether a plaintiff, after having recovered judgment in trespass without satisfaction, is thereby barred from subsequently maintaining trover, against another person for the same goods. Decided cases, asserting the negative, assume that the recovery of the judgment, in trespass, for the full value, has the effect to vest the title to the property in the defendant in that suit; and consequently, that the plaintiff cannot recover of another for that which he himself has ceased to own. *Broome* v. *Wooton* Yelv. 67. Other cases decide that the rule of *transit in rem judicatam*, extends no farther, than to bar another action for the same cause, against the same party. Of this latter class, the case of *Drake* v. *Mitchell* 3 East. 258, may be regarded as the most important; and Mr. Greenleaf, after referring to it, states that the weight of authority seems in favor of the latter opinion, and the same views are expressed in numerous cases decided by different courts in the United States. Lord Ellenborough held, in the case last named, that a judgment recovered in any form of action, was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and therefore, until then, that it could not operate to change any other collateral, concurrent remedy which the party might have. Attempt was made by a majority of the court in *Campbell* v. *Phelps*, 1 Pick. 62, to maintain that there was a distinction between cases of trespass or trover for goods, and trespass for a personal wrong or injury done to property; but PARKER C. J., who gave the opinion, was compelled to admit, that according to the modern decisions, nothing short of satisfaction of a judgment against one trespasser, for any tortious act would bar an action against his associates; and WILDE J. utterly denied that there was any such distinction, and held, that a recovery against one person, without satisfaction, was no bar to an action against another, for the same cause, and that there was no difference in this respect between joint contracts and joint torts. Adverting to the maxim *solutio pretii emptionis loco habetur*, Chancellor Kent says, 2 Comm. 10th ed. 388, that "the books either do not agree, or do not speak with precision on the point, whether the transfer takes place, in contemplation of law upon the judgment merely, or whether the amount of the judgment must be first actually paid or recovered by execution." Three theories, it will be seen, are stated by that author. First, that the mere recovery of judgment transfers the title, and he refers to *Broome* v. *Wooton*, Yelv. 67, as an example of the cases where that doctrine is held. Secondly, that the recovery

of judgment merely, does not have that effect; but if execution follow, the two things combined, transfer the property. Example given, is that of a case in Jenkins; but the language of the opinion is, that "by the recovery and *execution done thereon*," the property of the chattel is vested in the trespasser. Jenk. Cent. p. 189. Language to the same effect is employed in Shep. Touch., Title Gift, where it is said, that if one recovers damages of a trespasser for taking his goods, the law gives the trespasser the property of the goods *because he has paid for them:* but he has not paid for them, unless something has been done besides the issuing of the execution, which is only an incident of the judgment, an act of the clerk. Two cases, however, are cited, which support that view of the law, but neither of them seems to rest upon any substantial basis. *Curtis* v. *Groat*, 6 John, 168; *White* v. *Philbrick*, 5 Me. 147. Thirdly, the reference is to the rule of the civil law, that when the wrongful possessor of movable property, who is not in a condition to restore it, has been condemned in damages, and has paid the same to the original proprietor, he becomes possessed of the title; and the learned author refers to *Drake* v. *Mitchell*, 3 East. 251, as an example of the decisions of the common law courts, where that view of the law is maintained. Commenting upon that case, he concludes by saying, this is the more reasonable, if not the most authoritative conclusion on the question. Some diversity of judicial decision still exists, even in this country; but the great weight of authority in the United States, is on the side of the theory, that nothing short of satisfaction transfers the title, and in that view of the question I entirely concur. *Morgan* v. *Chester*, 4. Conn. 387; *Hyde* v. *Noble*, 13 N. H. 501; *Sharp* v. *Gray*, 5 B. Mon. 4; *Hepburn* v. *Sewall*, 5 Harr. and John. 212; *Barb* v. *Fish*, 5, West. Law Jour. 279; *Calkins* v. *Allerton*, 3 Barb. 173; *Jones* v. *McNeil*, 2 Bailey, 474; *Sheehy* v. *Mandeville*, 6 Cranch, 253; *Cooper* v. *Shepherd*, 3 C. B. 266; *Knott* v. *Cunningham* 2 Sneed, 204. Recovery of judgment merely, therefore, against one of the several tort feasors, is no bar to a suit against another for the same trespass; and it makes no difference whether the plaintiff did or did not take out execution on the first judgment, unless it also be shown that he received satisfaction. Where no satisfaction has been received, the law is clear, to the effect as stated; but the defendants contend, in the second place, that the recovery of judgment against the sheriff, and the receipt of partial satisfaction of the judgment from him, operate as a complete bar, upon the ground that the receipt of partial satisfaction is an election, on the part of the plaintiff, to seek his redress against that party. But the reason assigned for the conclusion, if it be a good one, proves too much, because the plaintiff, when he brought the first suit, elected to seek redress against the party prosecuted, and that election, if such it be regarded, was confirmed by his act, in prosecuting the suit to judgment. Subsequent acts, however, such as the taking out execution or the receipt of part satisfaction, add nothing to the force of the argument that the institution of the suit, and the prosecution of the same to judgment, show that the plaintiff had elected to seek redress against that party. Recovery of judgment against one is an election, undoubtedly, to regard the remedy as several, and such an election is final and conclusive. But the judgment

is no bar to another suit against another of the co-trespassers, as has already appeared, unless the judgment has been satisfied. Full satisfaction by one tort feasor, whether before or after judgment, is a good defence to a suit against any one of the others; but part satisfaction before suit would clearly be no defence, and it is not perceived that part satisfaction after judgment can have any other or greater effect. Suppose the part payment made by the judgment debtor had been made by him before he was sued; in that case it clearly would not have afforded him a full defence to the action, and if not, it is difficult to see how it can be any more effectual as a defence for a co-trespasser, because paid after judgment. Looking at the question as a question of principle, I am of the opinion that there is no middle ground on which a court of justice can safely stand in regard to it. When viewed in that light, it must either be held that the recovery of the judgment is a bar, or that it is no bar; and if the latter, as I hold, then nothing short of full satisfaction is an answer to a suit against another of the co-trespassers. Question is also made, whether the verdict and judgment against the sheriff are or are not conclusive upon the defendants. Affirmative of the proposition is assumed by the plaintiff, and the defendants maintain the negative. Facts of the case have already been stated, and need not be repeated, except to say that the case shows that the defendants were jointly liable for the same trespass, that they were duly notified of the pendency of the suit against the sheriff, and voluntarily appeared and conducted and controlled the defence.

Justice requires, says Mr. Greenleaf, 1 Greenl. Ev. sec. 522, that every cause be once fairly and impartially tried; but the public tranquillity demands, that having been once so tried, all litigation of that question between the parties should be closed forever. No man ought, however, to be bound by proceedings to which he was a stranger; but the converse of the rule is also true, which is, that by proceedings to which he is not a stranger, he may well be held bound. Under the term parties, says the same commentator, the law includes all who are directly interested in the subject matter, and have a right to make defence, adduce testimony, cross-examine witnesses, and control the proceedings, and appeal from the judgment. Courts of justice in general, agree that a judgment of a court of competent jurisdiction is conclusive in a second suit between the same parties or privies on the same question, although the subject matter may be different, and *a fortiori* it is so when the subject matter is the same. *Doty* v. *Brown*, 4 Comst. 71; *Castle* v. *Noyes*, 14 N. Y. 331. All parties are estopped by the judgment who had a right to appear, control the defence, and appeal from the judgment. The attachment in this case, in legal effect, had been made by the directions of these defendants, and they had given a bond of indemnity to the sheriff, and stipulated to save him harmless. They were, therefore, under a moral as well as legal obligation to defend the suit; and when they were duly notified to make the defence, and appeared and assumed the control of it, in pursuance of such notice, they had the right to adduce testimony and cross-examine the witnesses, and might have appealed from the judgment. Appeal, undoubtedly, must have been taken in the name of the sheriff; but as they had appeared in the case in pursuance of notice,

and the control of the defence had been conceded to them, under the stipulation in the bond of indemnity, to save the sheriff harmless, it cannot be doubted that they might have appealed from the judgment. *Castle* v. *Noyes*, 14 N. Y. 332. Where the first action was against the agent, who had taken lumber by the direction of the principal, and the case showed that the principal appeared and defended the suit, the Court of Appeals, in the case last mentioned, held that the parties in the second suit, which was a suit against the principal, who gave the directions, were to be regarded as the same, and that the former judgment was conclusive. Parties appearing and defending under such circumstances, are regarded as having the same rights substantially as the party in fact, and as having the same power and authority to use the judgment against the adverse party. *Smith et al.*, v. *Kernochen*, 7 How 217–219; *Calkins* v. *Allerton*, 3 Barb. 173; *Glass* v. *Nichols*, 35 Me. 328; *Wirfield* v. *Davis*, 14 B. Mon. 42; *Tarlton et al.* v. *Johnson*, 25 Ala. 314; *Eaton* v. *Cooper et. al.*, 29 Vt. 444; *Peterson et al.* v. *Lothrop*, 34 Penn. St. 228; *Farnsworth* v. *Arnold et al.*, 3 Sneed, 252; *Train* v. *Gold*, 5 Pick. 387. Stipulation of the bond of indemnity was, that the defendants would pay all damages the sheriff might sustain, *or which might be recovered against him* by reason of his attaching the property, and, of course, they covenanted for the results or consequences of any suit which might be brought against him on that account; and I am of the opinion that such a covenant so connected them in privity with the proceedings, that the record of the judgment is as conclusive against them as the actual party to the suit. *Rapelye* v. *Prince*, 4 Hill, 119, 1 Greenl. Ev. sec. 523; *Carver* v. *Jackson*, 4 Pet. 86; *Case* v. *Reeve*, 14 *John*, 81; *Chapin* v. *Curtis*, 23 Conn. 388; *Emery* v. *Fowler*, 39 Me. 326. Judgment, therefore, must be for the plaintiff; but the question is also presented, as to what the amount shall be, and the authority is conferred upon the court "to enter such judgment as shall be proper." Attention should be called to the fact, that the case is presented upon an agreed statement of facts. Federal courts regard such statements as a part of the record; and hence it is that a writ of error will lie upon an agreed statement of facts. *Suydam* v. *Williamson and al.*, 20 How. 434; *U. S.* v. *Eliason*, 16 Pet. 291; *Stimpson* v. *Railroad Co.*, 10 How. 329; *Graham* v. *Bayne*, 18 How. 60.

Regarding the question in that point of view, that it appears of record in this case that the measure of the injury sustained by the plaintiff was legally ascertained in his suit against the sheriff; that it also appears of record that eight hundred and thirty dollars of that amount has been paid, and I am of the opinion that the plaintiff is entitled to recover the same damages as in the suit against the sheriff, deducting the amount received in part satisfaction of that judgment, as set forth and admitted in the agreed statement, but adding to the balance so ascertained a sum in the nature of damages equal to six per cent. interest on account of the delay.

Judgment for plaintiff accordingly.

SUPREME COURT UNITED STATES.

DECEMBER TERM, 1865.

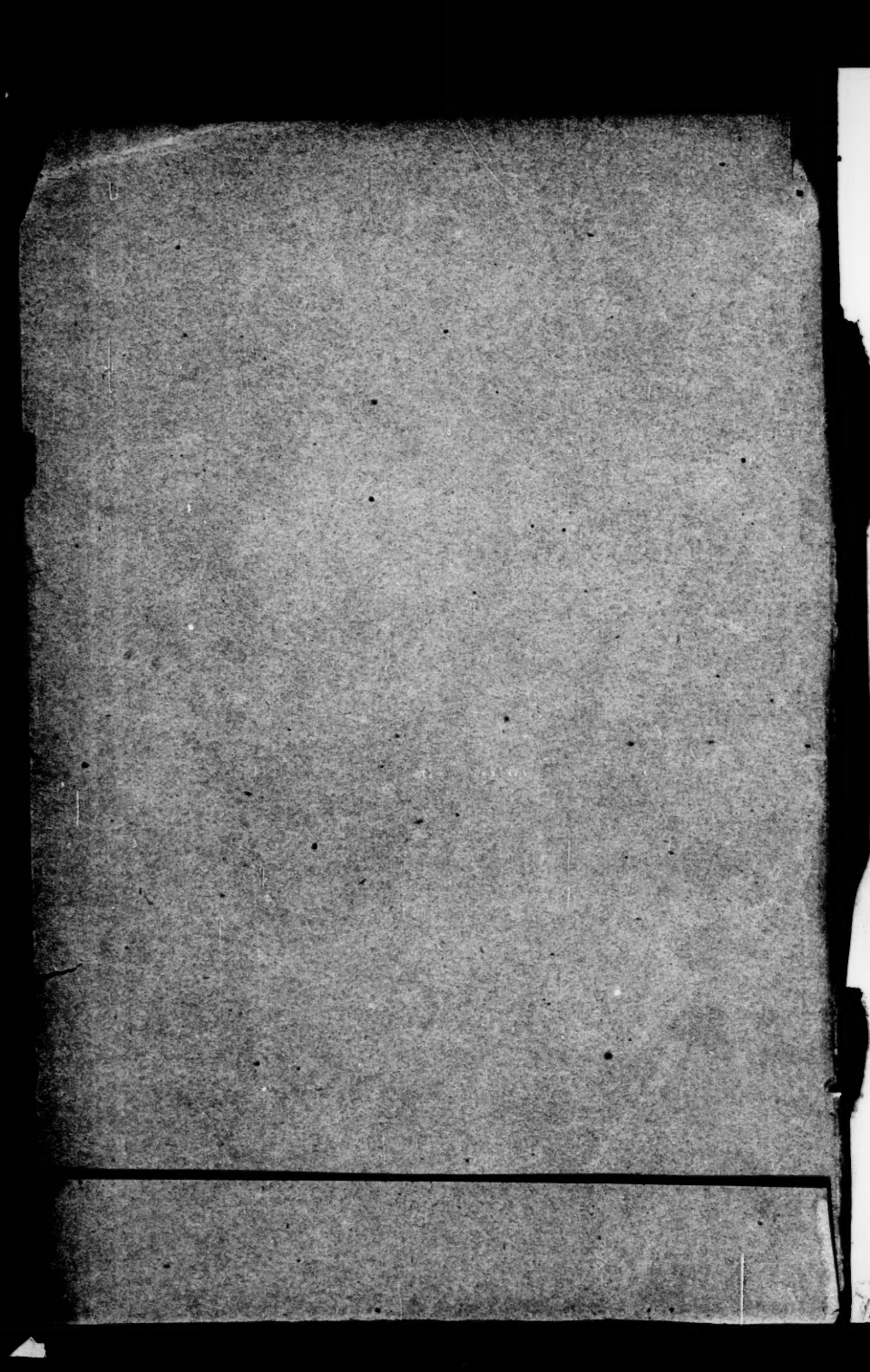
No.

WM. R. LOVEJOY ET ALII, PL'FFS IN ERROR,

vs.

EDWARD D. MURRAY, DEF'T IN ERROR.

BRIEF OF DEFENDANT IN ERROR.



Supreme Court of the United States.

No. 167.

WILLIAM R. LOVEJOY ET AL., PLAINTIFFS IN ERROR,

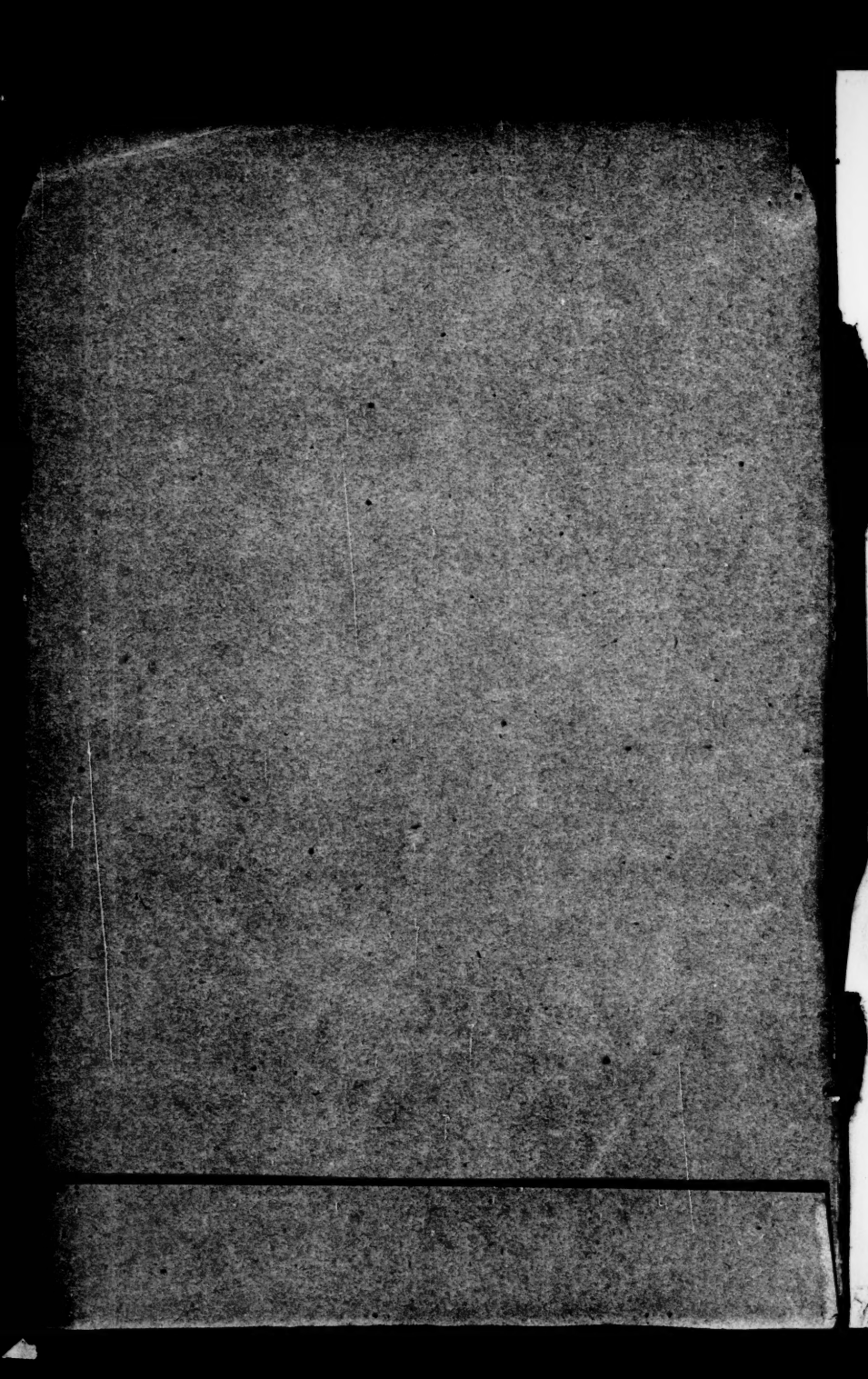
v.

EDWARD D. MURRAY.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

THE plaintiffs in error, citizens of Massachusetts, brought suit in the Courts of Iowa against one O. H. Pratt; and the officer to whom the writ was committed for service made an attachment therein of certain personal property as the property of said Pratt. For this attachment, the defendant in error sued the attaching officer, Hayden, in the Courts of Iowa, and recovered judgment for the sum of six thousand two hundred and thirty-three dollars and three cents damages, and seventy-seven dollars and fifty-five cents costs of suit, and *received partial satisfaction of the officer* on the judgment. He now brings suit for the same trespass against the plaintiffs in error, who were the attaching creditors. The plaintiffs in error gave the officer a bond of indemnity at the time of the attachment, and took part in the defence of the suit.



Supreme Court of the United States.

No. 167.

WILLIAM R. LOVEJOY ET AL., PLAINTIFFS IN ERROR,

v.

EDWARD D. MURRAY.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

THE plaintiffs in error, citizens of Massachusetts, brought suit in the Courts of Iowa against one O. H. Pratt; and the officer to whom the writ was committed for service made an attachment therein of certain personal property as the property of said Pratt. For this attachment, the defendant in error sued the attaching officer, Hayden, in the Courts of Iowa, and recovered judgment for the sum of six thousand two hundred and thirty-three dollars and three cents damages, and seventy-seven dollars and fifty-five cents costs of suit, and *received partial satisfaction of the officer* on the judgment. He now brings suit for the same trespass against the plaintiffs in error, who were the attaching creditors. The plaintiffs in error gave the officer a bond of indemnity at the time of the attachment, and took part in the defence of the suit.

It was held in the Court below, —

(1.) That this action could be maintained against the plaintiffs in error, although partial satisfaction had been obtained of the officer on the judgment against him.

(2.) That, inasmuch as it appeared that the plaintiffs in error defended the suit against the officer, they were *concluded* by th judgment recovered in that suit.

See opinion of the Court below. Law Rep. June, 1864, p. 423.

I. There seems to be a great conflict of opinion in the boo whether a judgment *alone* against one tort feasor operates as a bar a suit against another, — some holding it to be an absolute bar, othe that judgment *with execution* is necessary, and others that *satisfaction* is necessary.

In the following cases in this country it has been held that *judgment alone operates* as a bar: —

Murrell *v.* Johnson's Adm'r, 1 Hen. and Munf. 449.
Wilkes *v.* Jackson, 2 " " 355.
Rogers et al. *v.* Moore, 1 Rice S. C. 60, 62.
Norris *v.* Beckley, 2 Const. Rep. S. C. 228 (N. S.)
Johnson et al. *v.* Packer, Nott and McCord, 1.
Wilburn *v.* Bogan, 1 Spears, 179.
Floyd *v.* Browne, Adm'r, 1 Rawle, 121.
Marsh *v.* Pier, 4 Rawle, 288.
Fox *v.* Northern Liberties, 3 Watts and Sarg. 103, 107.
Merrick's Estate, 5 " " 9, 17.
Trafton et al. *v.* U. S. 3 Story, 646 (adopting English doctrine).
Town of Marlborough *v.* Sisson et al. 31 Conn. 332.
Ayer *v.* Ashmead, 31 " 447, 453.
Knickerbacker *v.* Colver, 8 Cowen, 111.
Same *v.* Hawes, 8 " 111.
Sheldon *v.* Kibbe, 3 Conn. 214 (Chapman, J., dissenting).
Hunt et al. *v.* Bates, 7 Rhode Island, 217.

In the following cases, that judgment and execution operate as a bar: —

Livingston *v.* Bishop, 4 Johns. 290.
White *v.* Philbrick, 5 Greenl. 147.
Campbell *v.* Phelps, 1 Pick. 62–65.

In the following case, and some others, it was held that satisfaction was necessary: —

Sanderson *v.* Caldwell, 2 Aiken, 195.

II. It is impossible to reconcile these cases; but the English Courts keep clear of the whole difficulty by treating the *judgment* alone as a bar; and this, it is submitted, is the better doctrine.

Addison on Torts, ~~750, 752.~~ p 302. 303. 859 & 860. 861. (2nd)
Buckland *v.* Johnson, 15 C. B. 145, 161–163 (80 Eng. C. Law 145, 159). Cooper v Shepherd 3 Exch. 13. 271
King et al. *v.* Hoare, 13 Mees. and Wels. 494, 504, 505.
Leachmere et al. *v.* Fletcher, 1 Crompt. and Mees. 623, 634.
Bird *v.* Randall, 3 Burr, 1345.
Broome *v.* Wooton, Cro. James, 73 (Rep. Yelv. 67).

III. But if the Court shall be of the opinion that a party may sue and recover *separate* judgments against co-trespassers, and then *elect* which judgment he will enforce, then we say that the recovery of judgment against the officer, Hayden, and the receipt of *partial satisfaction* on that judgment from the officer before the commencement of this suit, will operate as a bar to this suit.

Livingston *v.* Bishop, 4 Johns. 290.
Thomas *v.* Rumsey, 6 Johns. 26.
Hunt et al. *v.* Bates, 7 Rhode Id. 217.
Harrington *v.* Fuller, 18 Maine (6 Shepley), 277.

In the case of Sanderson *v.* Caldwell, 2 Aiken, 195, which is much relied upon by the defendants in error, the judgment first recovered was *in no part satisfied.*

IV. How can the Court proceed now to try the original trespass when it has been *partially* settled for? How would a declaration be framed? How would the Court proceed at the trial? What becomes of the $800 paid? Must it not be credited in some way, or deducted? and if so, how? The plaintiff is seeking to recover full damage for a wrong partially redressed.

Fox *v.* Northern Liberties, 3 Watts and S. 103.

V. The fact that payment was made by Hayden upon the execution against him from the proceeds of the goods sold can make no difference with its *effect.* It was received as a payment, paid as and for a payment, and must operate as a payment. The money used had no ear-mark, and the payment cannot be recovered, and the money was not paid with the knowledge or assent of the plaintiffs in error. "After the (defendant in error) had recovered judgment against (the officer) in trespass, and had taken out execution and collected a part of the amount so recovered, the property was changed. It was no longer held in an official character. It became a part of (the officer's) own estate."

Shepley, J., Harrington *v.* Fuller, 18 Maine, 277.

VI. The plaintiffs in error are not estopped to defend this suit because they gave Hayden a bond of indemnity, or because they took part in the defence of the suit against the officer. If this were a suit by the officer against the plaintiffs in error upon their bond of indemnity to him against that suit, and upon notice or otherwise they had defended the suit against him, then perhaps as between them and the officer they would have been concluded by the judgment against

him. But that is not the question here. The defendants were neither parties nor privies to the plaintiffs' judgment against Hayden.

Sprague *v.* Oakes, 19 Pick, 455, 458; 1 Green. Ev. § 525.
Alexander *v.* Taylor, 4 Denio, 302.
Church *v.* Leavenworth, 4 Day, 278.

VII. The Court below held that the judgment against the officer was no bar to this action, and yet held that the judgment was conclusive against the plaintiffs in error, both of their liability and of the amount for which they were liable. It is respectfully submitted that the two propositions are on their face inconsistent.

VIII. An attaching creditor is not answerable in trespass for an attachment made by an officer unless the attachment is made in pursuance of directions by him. The relation between an attaching creditor and officer is not that of master and servant, nor principal and agent.

Addison on Torts, p. 489.
Sowell *v.* Champion, 6 Ad. and El. (K. B.) 417.
Fitler *v.* Fossard, 7 Barr, 540.

IX. The case does not show that the attachment of the goods of Pratt was made by the *direction* of the plaintiffs. The agreed statement only shows that a bond of indemnity was given by the plaintiffs in error to the officer. This does not make the plaintiffs in error trespassers, neither does the defence of the suit against Hayden. One may indemnify an officer for an act committed by him without being liable for that act himself, and may defend a suit against an officer without being himself a trespasser.

Henry C. Hutchins
Plaintiffs in Error